IN THE

Supreme Court of the United States

October Term, 1957

No. 87

UNITED STATES OF AMERICA

Appellee

—v.—

JOSEPH GEORGE SHERMAN

Appellant

APPELLANT'S BRIEF

HENRY A. LOWENBERG
Attorney for Petitioner

INDEX

Authorities Cited

To be argued by
HENRY A. LOWENBERG.

IN THE

Supreme Court of the United States

October Term, 1957

No. 87

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH GEORGE SHERMAN,

Appellant.

APPELLANT'S BRIEF

Preliminary Statement

Certiorari to the United States Court of Appeals for the Second Circuit has been granted by this Honorable Court to review an affirmance of a judgment of conviction of the appellant by the United States Court of Appeals, Second Circuit, of the crimes of unlawfully, wilfully and knowingly receiving, concealing, selling and facilitating the transportation, concealment and sale of a narcotic drug.

The appellant was sentenced to a term of ten years.

There had been a prior trial of this case which resulted in a conviction of the appellant and a reversal of that judgment of conviction by the Court of Appeals for the Second Circuit.

Statutes Involved

21 U. S. C.:

"Section 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures—

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections; or which is summarily forfeited as provided in this subdivision, shall be

placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Section 174. Same; penalty; evidence—* * *

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Facts

This was a retrial of this case. The first trial ended in a conviction which was reversed by the Court of Appeals, Second Circuit, 200 F. 2d 880.

The Government on the trial of the indictment called eight witnesses. CLIFFORD MELIKIAN, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, RAYMOND C. RUDDEN, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, JAMES C. HUNT, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, GEORGE J. ROMIG, JR., chief chemist in the Treasury Department laboratory in New York City, CHARLES KALCHINIAN, who testified as a Government's witness on the previous trial, MICHAEL J. REYNOLDS, narcotic agent, United States Treasury Department, CECIL E. NICKELL, narcotic agent, United States Bureau of Narcotics and ANTHONY J. DRAGO, Special investigator and chief of the identification unit of the Alcohol

and Tobacco Tax Division of the Internal Revenue Service, United States Treasury Department.

The appellant did not testify and did not call any witnesses, but rested at the end of the Government's case.

CLIFFORD MELIKIAN testified that he is a narcotic agent and that on November 1, 1951, he met agent Hunt and special employee Kalchinian in the vicinity of 46th Street and Eighth Avenue. Kalchinian, the informer, got into their car and agent Hunt searched him, found no narcotics and gave him $15.00. They then drove to 24th Street and Eighth Avenue where Kalchinian got out of the car and he and agent Hunt followed (p. 12). They observed the appellant meet Kalchinian. He observed appellant hand something to Kalchinian and Kalchinian hand something to appellant. Kalchinian returned to the Government's car and Kalchinian gave to him a glassine envelope containing a white substance. He, agent Hunt and Kalchinian initialed the glassine envelope (p. 13). On November 7, 1951, he and agents Hunt and Coyle met Kalchinian. Kalchinian got into the Government's car and Hunt searched Kalchinian and found no narcotics and he gave Kalchinian $15.00. Kalchinian then got out of the car, met appellant, with him and agent Hunt following. He observed appellant hand something to Kalchinian and Kalchinian hand something to appellant (p. 14). Agent Hunt and he followed appellant, and then went back and met agent Coyle and Kalchinian. Agent Coyle gave him a Pall Mall cigarette package in which was a glassine envelope with a white substance and all then initialed the package. On November 16, 1951, he and agent Rudden met Kalchinian. He copied the serial numbers of a $10.00

bill and a $5.00 bill on a piece of paper. Agent Rudden searched Kalchinian, found no narcotics, and he gave Kalchinian $15.00 (p. 15). This was the same money that he had noted the numbers of. He observed appellant meet Kalchinian, appellant hand something to Kalchinian and Kalchinian hand something to appellant. He followed appellant to 264 West 17th Street where he was joined by agent Rudden. They were admitted to the house by the appellant, where appellant was arrested. He found the $10.00 bill and $5.00 bill, which serial numbers had been noted by him, on the person of appellant (p. 16). The paper on which were written the serial numbers of the bills and the bills were received in evidence (pp. 17 and 18). The package which he received from Kalchinian on November 1, he weighed and conducted a field test of its contents which resulted in a positive reaction. He then placed the contents in a lock, sealed envelope and delivered to the Government laboratory (pp. 18-19). With respect to activities on November 7, 1951, he retained custody of the package, tested and weighed it (p. 23). Following the arrest of the appellant on November 16, 1951, agent Rudden gave him a glassine envelope, on which he placed his initials and weighed the contents and placed it in a lock sealed envelope (p. 24).

On cross examination, he testified that he first met Kalchinian, the informer, in the summer of 1951, at which time Kalchinian was under arrest on a narcotic charge (p. 26). The United States Attorney requested of the Court a suspended sentence for Kalchinian on the narcotic charge (p. 27). He was not present at any conversation between Kalchinian and appellant (p. 28). He does not know if Kalchinian would induce anyone to sell him narcotics.

Appellant told him at the time of the arrest that he was operating a rooming house at 264 West 17th Street, and he did not find out anything to the contrary (p. 29). He supposed appellant's income was derived from the rooming house (p. 29). No narcotics were found in appellant's premises although a search was conducted (p. 30). Kalchinian met appellant in the office of Doctor Grossman (p. 31). He did not know that appellant was at the doctor's office for a cure. He did not remember his testimony at the previous trial that the appellant told him that he was at Dr. Grossman's office for a cure for narcotic addiction (p. 31). Dr. Grossman has the practice of attempting to cure narcotic addicts (p. 32). He was not interested as to how the buy was to be made by Kalchinian as long as the buy was made (p. 33).

Raymond C. Rudden, testified that he is an agent of the Bureau of Narcotics (p. 34). On November 16, 1951, he met agent Melikian and Melikian noted two bills, a $10.00 bill and a $5.00 bill. They then met Kalchinian and he searched Kalchinian, found no narcotics. Kalchinian then left the Government's car, met the appellant, and the appellant handed something to Kalchinian (p. 35). Kalchinian then joined this witness and agent Melikian. They entered a Government car and Kalchinian handed him a Chesterfield cigarette package which contained a glassine envelope of white powder. He followed agent Melikian into 264 West 17th Street. Agent Melikian placed appellant under arrest there and from a number of bills taken from appellant were the two bills previously noted by agent Melikian (p. 36). He searched the room in which appellant and Melikian were standing. He turned the package given to him by Kalchinian over to agent Melikian (p. 37).

On cross examination, he testified that he had not met Kalchinian prior to this November 16 (p. 38). He did not find any narcotics in appellant's premises (p. 38). Appellant told him he collected rents for the building (p. 38). He was not interested in finding out how many times Kalchinian spoke to appellant about narcotics (p. 38). He did not check to see whether Kalchinian induced appellant to give him narcotics, nor did he investigate to find out if the appellant was entrapped on this narcotic charge (p. 39). He did not have a search warrant when he searched appellant and appellant did not object when he searched appellant's premises (p. 40).

JAMES C. HUNT testified that he has been a narcotic agent since August 15, 1951. On November 1, 1951, he and agent Melikian met the informer. He searched the informer, found no narcotics or money on him, and agent Melikian gave the informer $15.00. The informer got out of the car, and he saw the informer meet the appellant. He saw the appellant hand something to the informer and the informer hand something to the appellant. The informer then returned to the Government car where he searched the informer, found no money on him. The informer gave a Pall Mall cigarette package containing a white powder to agent Melikian. He and agent Melikian affixed their initials and date to contents of glassine envelope and Pall Mall package (pp. 41-42). On November 7, 1951, he and agents Coyle and Melikian met the Government informer. He searched the informer, found no narcotics on him, and agent Melikian gave the informer $15.00. The informer met the appellant and he saw the informer hand something to the appellant and the appellant hand something to the informer (p. 43). He and agent Melikian

followed the appellant, and they then returned to the Government car, at which time agent Coyle had a white powder contained in a glassine envelope, which the informer said he had purchased from appellant. The agents affixed their initials and date to the package (p. 44).

On cross-examination, he testified that he knew nothing about the informer. The informer was attached to agent Melikian. He never suggested to agent Melikian to check on the informer, to find out what kind of person he is, or whether he is reliable or not (p. 45). He did not know how the informer met the appellant (p. 46).

GEORGE W. ROMIG, JR., called then as a witness for the Government testified that he is the chief chemist in the Treasury Department laboratory in New York City. He identified a record from his laboratory, Government's Exhibit 2-B for identification which was received in evidence. He also identified Government's Exhibit 3-B as a record from his laboratory which was received in evidence. He also identified Government's Exhibit 4-B as a record of the laboratory maintained by it in the regular course of business (pp. 57-60). He did not know of the accuracy of the "Remarks". Part of the information was furnished by somebody else in the reports. The lower half of the reports is his report (p. 60). The top part of the aforementioned exhibits were typed in by the narcotic agent (p. 62). The records come in with the narcotics and the narcotics are then analyzed and he fills in the bottom of the record. He has no personal knowledge of the contents of the top part of the aforementioned records (pp. 62-63). Exhibits 2B-3B and 4B were received in evidence over appellant's objection and exception (p. 64). The Bureau of Narcotics

submits a form to his office requesting the return of the narcotics and once a month narcotic agents come to his office and pick up the narcotics based on this form and he gets a receipt (p. 64). He then identified Government Exhibit 5 as one of the records which he gets after he gets a receipt for narcotics returned to the Narcotic Bureau. The receipt appears on this record. Exhibit 5 was received in evidence over appellant's objection and exception (pp. 63-64).

The next witness called by the Government was CHARLES KALCHINIAN. He testified that he had been convicted of the crime of the sale of narcotics. Following his arrest for narcotics by a Federal agent he performed services for the Bureau of Narcotics. At the time of his arrest he was addicted to the use of narcotics (pp. 66-67). He first met appellant in a doctor's office where had gone for a cure of narcotic addiction. He saw appellant in the doctor's office half dozen times. He used to go to a pharmacy to have prescriptions filled and saw appellant also there. He asked appellant about his experiences and appellant asked him about his experiences. He asked appellant if he had been getting drugs, and what quality. He asked appellant if there was a reliable man he could meet and appellant said he knew some people. He asked appellant if he could meet these people and appellant said nothing. He spoke to appellant again on the subject and appellant said "No". He told appellant he was not responding to treatment and needed something to sustain himself (pp. 68-69). Appellant said he might be able to get it. He later again asked appellant and appellant said he was working on it. He asked appellant how he could contact him. Appellant asked him where he could be contacted and he gave appellant his

telephone number (p. 70). They agreed at all times to meet at the corner of 20th Street and Eighth Avenue. Appellant telephoned him about the first part of September and appellant delivered narcotics to him. Appellant telephoned him three or four times a week, but meetings were not always arranged. He decided to report these activities to Federal Bureau of Narcotics toward the end of October (p. 71). He saw agent Melikian (p. 72). He also spoke to a Mr. Levine of the Narcotic Bureau (p. 73). Appellant telephoned him after his visit to Narcotic Bureau. He called agent Melikian and told him that he was to make a purchase. That was on November 1, and he then met agents Hunt and Melikian. He was searched by agent Hunt and Melikian gave him $15.00. He then met appellant, appellant gave him a package and he gave appellant $15.00. He then met agent Hunt, and he gave to agent Hunt the package (pp. 74-75). The next time he informed the agents of a pending transaction with appellant was on November 7th. Appellant had called him. An appointment was made. He met agents Hunt, Coyle and Melikian. He was searched by Hunt and Melikian gave him $15.00. He then met appellant and appellant gave him a package and he gave appellant the $15.00. He then returned to the Government car, where he was searched by agent Hunt (pp. 76-77). He arranged another purchase from appellant which he did not report (p. 78). On November 16th, he received a call from appellant which he reported to agent Melikian. He made an appointment to meet appellant. He met agents Rudden and Melikian. He was searched by Rudden and Melikian gave him $15.00. He then met appellant. Appellant gave him a package and he gave appellant the money (p. 78). He then returned to the Government car, and was searched

by agent Rudden. He handed the package to agent Rudden and the package was initialed. He had made other purchases from appellant on his own account which he did not report (pp. 78-79). Prior to dealing with appellant, he made purchases elsewhere at a lower price (p. 80).

On cross examination, he testified he has now entered the field of photography and is living in Pasadena, California (p. 81). The punctures in his arm are from a narcotic needle of 15 years ago (p. 82). He has also used the names of James Ballow and Charles Gleason. At the time of his arrest and conviction for the sale of narcotics, he was a night clerk and manager of a hotel (p. 84). He would spend, during that period, thirty or forty dollars a week for narcotics while his salary was sixty, sixty-five dollars a week. He did not live at the hotel. He denied ever committing a theft (p. 85). To live he borrowed money. This was all a year or two before these incidents. He pleaded guilty to the sale of narcotics (p. 86). He had thirty-five dollars a week to live on, to pay his rent, clothes and food and still paid back loans he had made. On his arrest for sale of narcotics to which he pleaded guilty, he was released on his own recognizance, without bail (p. 88). On the day of sentence, the United States Attorney told the Judge that he had cooperated and been useful to the Government. He did not want to go to jail (p. 89). He helped the Government in at least three cases (p. 90). He was at Dr. Grossman's office for a cure and appellant told him that he also was there for a cure. He saw appellant in Dr. Grossman's office (p. 90). He saw appellant in the doctor's office from time to time and the doctor has been treating addicts. He met appellant in the doctor's office by accident. Sometimes their appointments at the doctor's office

happened to be at the same time. After seeing appellant in doctor's office two or three times, he said "hello" to appellant. Outside of the doctor's office, they discussed narcotics. He broached the subject two or three times to appellant about getting narcotics. The appellant just listened (p. 93). Knowing that appellant was at the doctor's office for a cure of narcotics addiction, he spoke to appellant about narcotics (p. 94). He approached appellant two or three times to supply narcotics (p. 96). He told agents, during the previous trial, that he thought we were getting along all right (p. 97). He had promised to cooperate before his sentence (p. 99). It was his job, while working with the agents, to go out and try to induce a person to sell narcotics to him (p. 100). He did not know how to answer the question whether he would be prepared to send an innocent man up to help himself (p. 101). Appellant told him that he was a handyman. On the previous trial, he testified that appellant told him he was giving him half the narcotics he had bought. The appellant said he had paid $25.00 and that he would have to give appellant $15.00. The appellant told him he had taxi expenses (p. 108). On the previous trial, he testified that he and appellant were taking a withdrawal treatment by Dr. Grossman (p. 110). On previous trial, he testified that when he broached the subject of narcotics to appellant, appellant just listened (p. 112). The second time, they both talked on the subject (p. 113). The Bureau of Narcotics made suggestions to him as to how to approach appellant (p. 115). In addition, to appellant telling him that he, appellant, was at the doctor's office for a cure, he knew that appellant was going to same pharmacy as he to have his prescriptions filled (p. 124). On redirect examination, he testified that he would not frame an innocent man (p. 125).

MICHAEL J. REYNOLDS testified that he is a narcotic agent. He prepared a schedule of drugs received, confiscated and surrendered to Drug Disposal Committee. He was shown Government Exhibit 6 and it was such schedule (p. 127). He was shown Government Exhibit 7 and identified that as the Government bill of lading showing a shipment to Drug Disposal Committee of Bureau of Narcotics (pp. 128-129).

CECIL E. NICKELL testified that he is a narcotic agent and is a member of Drug Disposal Committee assigned to Washington, D. C. (p. 130). He identified Government Exhibit 8 as a record of drug shipments. The receipt of shipment in Government Exhibit 7 is shown on Exhibit 8 (p. 131). He identified Government Exhibit 9 as a schedule of drugs shipped to Drug Disposal Committee which schedule is on the inside of the box of drugs (p. 132). It is the same as shown in Government Exhibit 8 (p. 133). He could not testify that any substance delivered to him was a narcotic drug (p. 134).

The Government then offered into evidence, over objection by appellant and motion made by appellant for a mistrial, Exhibits 10 and 11. Exhibits 10 and 11 are the files of the Court, numbers C112-103, C124-58, showing that appellant had been convicted twice before of narcotics (pp. 136-137-138).

CLIFFORD MELIKIAN, then recalled by the Government testified that following the arrest of the appellant, he took appellant to the Bureau of Narcotics where appellant was fingerprinted and photographed (p. 139). The fingerprint cards are submitted to the identification branch of Federal Bureau of Investigation. He identified Exhibit 12 as in-

formation he received from the FBI as a result of these prints about the appellant (p. 139). There was then a long colloquy between the trial court, assistant United States Attorney and counsel for appellant as to Exhibit 12, a report received from FBI (pp. 139 to 148). The Court received in evidence record of convictions of a man named Sherman for 1942 and 1946 (p. 146).

Clifford Melikian, over constant objection of appellant, continued to testify that it is the custom of Bureau of Narcotics to place an index number on each case. That number goes on fingerprint charts (p. 150). He then identified Form 121, which is a record kept by the Federal Bureau of Narcotics which gives the name of defendant, date of conviction and disposition by the Judge and which contains the docket number of the Federal Court (p. 153). The Court received all records pertaining to previous convictions of appellant for narcotics over appellant's objections (pp. 154 to 174).

The appellant rested at the end of the Government's case. The appellant did not take the witness stand nor did he offer any evidence.

POINT I

The appellant was entrapped by the Government and appellant should have been acquitted and the indictment dismissed by virtue of such entrapment.

It cannot be disputed that the appellant and the special informer for the Government, Charles Kachinian met in a doctor's office where the appellant went for a cure from narcotic addiction. The special employee for the Government approached appellant about narcotics two or three

times, even telling appellant that he was not responding to treatment. The appellant finally weakened. They had met in the doctor's office half dozen times and went together to the pharmacy to have their prescriptions filled. The narcotics appellant obtained at the instigation of Government informer were divided between appellant and this informer. The appellant paid twenty-five dollars for narcotics and the special employee gave appellant fifteen dollars which included cab fare. The special employee was under criminal charges for dealing in narcotics when he made these purchases. He was used as a decoy to make a case against the appellant. So here we have a situation where the appellant is at a physician's office to rehabilitate himself, to cure himself of narcotic addiction, and to get himself away entirely from any dealings with narcotics whatsoever, and there he is approached by a special employee of the Bureau of Narcotics. There is no evidence that the appellant was engaged in the traffic of narcotics at that time.

This was a retrial of this indictment. The previous trial ended in a judgment of conviction and a reversal of the judgment of conviction, *United States* v. *Sherman*, 200 F. 2d 880.

On this retrial of this indictment, the Government produced the same witnesses, only with the exception that proof was produced by the Government that the narcotics were destroyed and proof of the appellant's prior convictions for narcotics as a direct part of the Government's case, without the appellant taking the witness stand or offering any proof, but resting his case at the end of the Government's case.

On this same evidence, the Court, in reversing the previous conviction of this appellant, on this indictment held that this appellant was entrapped by the Government into committing this crime, *United States v. Sherman*, 200 F. 2d 880. The Court at pages 882-883 of this case said:

> "Therefore in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it. In the case at bar plainly Kalchinian did induce the first sale, but that was irrelevant, unless at that time the two had made the agreement described above. If they did, it would be true that the later sales resulted from Kalchinian's original inducement for it meant that he was in the market, so to say, and might buy whenever Sherman had any heroin to offer. *Although, as we have said, on that issue Sherman had the affirmative the evidence to support the defense was ample, if indeed not conclusive. On the other hand since the prosecution had the burden upon the issue of the excuse for inducement, it had to satisfy the Jury that Sherman did not need any persuasion; but that he stood ready to procure heroin for anyone who asked for it; and the evidence scarcely supported such a finding. So far as appeared, Sherman shared his heroin with Kalchinian as a fellow addict, and without profit.* That was no evidence that he was in the habit of dispensing heroin, any more than his habit of buying it illicitly for himself or than the furtive way in which he wrapped up the heroin. We need not however decide that the refusal to direct a verdict required

> a dismissal of the indictment because there must be a reversal anyway, and upon a new trial there may be other evidence of Sherman's dealings in narcotics."

In the case of *United States* v. *Becker*, 62 F. 2d 1007, Judge Hand in holding that the defendant was not entrapped, stated at page 1008:

> "The precise limits were left open as to what would excuse such instigation. The only excuses that Courts have suggested so far as we can find, are these: an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance."

The Court further stated, at page 1008:

> "However, it has been uniformly held that when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance in a uniform series."

There is no evidence in this case that the appellant was dealing in narcotics at the time of this indictment. The two previous convictions of appellant, which were received in evidence as a part of the Government's case, over objection by appellant and denial of a mistrial, were in 1942 and 1946 while the indictment here charged a violation of the narcotic law in the year 1951. There was no evidence offered by the Government to show that the appellant was engaged in sales of narcotics from the date of his last conviction in 1946 to the dates of the crimes charged in this indictment, which were in the year 1951. In other words,

there was no proof at all offered by the Government as to the appellant from 1946 to 1951, a lapse of five years. There therefore was no evidence that appellant was continuously engaged in the traffic. As a matter of fact, Kalchinian, the Government's witness, testified that the appellant was a handyman.

The leading case on the law of entrapment is *Sorrells* v. *United States*, 287 U. S. 435 (1932). In that case, a prohibition agent went to the defendant's home, accompanied by three residents who knew the defendant well. The agent asked the defendant if he could get him some liquor. Defendant stated that he did not have any. The agent made a second request without result. On the third request, defendant left his home and after a few minutes came back with a half gallon of liquor. The agent testified that he was the first and only person among those present at the time who said anything about securing liquor, and that his purpose was to prosecute the defendant for procuring and selling it. To support this testimony, the Government called three witnesses who testified that the defendant had the general reputation of rum runner. There was no evidence, however, that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question.

The Court held that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the agent, that it was the creature of his purpose, and that the defendant had no previous disposition to commit it, also that the agent lured the defendant, otherwise innocent, to its commission by repeated and persistent solicitation (p. 441).

The facts in this instant case can be favorably compared to the facts in case of *Sorrells* v. *United States*, 287 U. S. 435, above cited. In the case at bar, Kalchinian, the informer for the Government, instigated the crimes here by soliciting appellant two or three times to obtain narcotics, to be divided between them. He instigated the crimes here knowing full well that appellant was being treated by a physician for narcotic addiction, having met appellant in the doctor's office. The evidence here shows that the crimes here were the creature of Kalchinian and that he lured appellant, otherwise innocent, into obtaining narcotics for him and appellant, to be divided between them.

So here we have a situation where the appellant is at a physician's office to rehabilitate himself, to cure himself of narcotic addiction, and to get away entirely from any dealings with narcotics whatsoever, and there he is approached by a special employee of the Bureau of Narcotics. To condone such a practice would merely mean that any addict who wishes to rehabilitate himself and to cure himself of narcotic addiction could be made the subject of a party to a sale and thereby destroy any hope for that individual's attempt to rehabilitate himself and cure himself. For this Court to condone this conduct will merely mean that any addict would not even be safe in a doctor's office for fear that he might be approached by an informer for the Government and induced to participate in a division of narcotics between them.

In affirming the judgment of conviction on February 4, 1957 of this appellant, the United States Court of Appeals in part said:

> "On that appeal we set aside appellant's conviction because of error in the charge. This error was

corrected on the second trial and the evidence was sufficient to warrant a finding 'that the accused was ready and willing to commit the offense charged, whenever the opportunity offered.' The jury was justified in regarding appellant's hesitancy as no more than prudent caution on the part of an experienced trafficker in narcotics. Certainly his *modus operandi* suggested such experience. Nor was the jury bound to accept appellant's statement that the sales were without profit. Kalchinian testified that he had obtained the same quantities from his prior supplier at lower rates. Appellant's prior convictions were of course cogent evidence of a predisposition to commit the offenses charged. Appellant's last conviction was in 1946, five years before the offenses charged, but he does not appear to have strayed far from the trade. He was obtaining drugs illegally during the intervening period and it was a permissible inference that he had not changed his ways. In this connection it may be noted that his second conviction was separated from the first by a gap of four years and that the fact that he continued to traffic in narcotics following his first conviction indicated a disposition to continue his trade despite detection and punishment."

There was not a word of evidence as to the appellant from 1946 to 1951, when in the year 1951 the appellant was in the office of a doctor for a cure for addiction to narcotics where by chance he met the informer for the Government who was also there for a cure. When the appellant became addicted to the use of narcotics is an open question. The Government offered no evidence of that. It may have been a month or two months before the appellant visited the doctor. Yet the Court of Appeals drew an inference not predicated on any facts in evidence.

POINT II

The receipt into evidence of the convictions of the appellant in 1942 and 1946 where the indictment here charged crimes in 1951, without the appellant taking the witness stand or calling any witnesses, but resting at the conclusion of the Government's case was in violation of Article 5 of the Amendments to the Constitution of the United States.

Article 5 provides:

> "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." (Italics ours.)

There was no evidence offered by the Government at the trial as to the appellant from 1946 to 1951. Surely a lapse of five years without any evidence cannot show a predisposition on the part of the appellant to commit a crime or show any criminal intent. Surely it is not to be said that because one has committed a crime several years before his indictment on another crime, that with that lapse of years, a defendant had a continuing predisposition to commit a crime or crimes and had a continuing criminal intent. If that were the case, then anyone who had ever been convicted of a crime would have no chance to readjust himself.

In the case of *Berger* v. *United States*, 295 U. S. 78, at page 88 this Honorable Court stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; *and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.*"

It is therefore urged that the receipt into evidence of the previous convictions of appellant as a part of Government's direct case, in 1942 and 1946, without appellant testifying, but resting at the end of Government's case, surely was compelling the appellant to be a witness against himself in violation of Article 5 of the Amendments to the United States Constitution. It was also a denial of due process of law and a denial of a fair trial. It is submitted that the office of the United States Attorney surely cannot take issue with the fact that the receipt into evidence of the appellant's two convictions in 1942 and 1946 must have had a marked effect on the Jury.

POINT III

Even if this Honorable Court should hold that an accused's record of convictions may be admitted into evidence, without any defense being offered, it is urged that the convictions of the appellant in 1942 and 1946 were too remote from the crimes charged in 1951 as to make those convictions admissible into evidence, with no evidence offered by the Government about the appellant from 1946 to 1951.

The Government showed nothing about the appellant from the date of his last conviction in 1946 and crimes here now charged in 1951. There was a lapse of five years with no evidence about the appellant. The fact that the appellant was convicted in 1942 and 1946 for narcotics, that in itself, would not show that the appellant was in the habit of dispensing heroin even on those dates. Surely with a period of five years intervening between the conviction of appellant in 1946 and this crime of 1951, with no evidence about the appellant during this five year period, surely could not show that he was engaged in dispensing heroin during five years after the last conviction. With no evidence about the appellant during this period, surely a lapse of five years from the date of the last conviction would be too remote. In fact, when the Court used the expression in the opinion in *United States* v. *Sherman*, *supra*, "that was no evidence that he was in the habit of dispensing heroin, any more than his habit of buying it illicitly for himself or than the furtive way in which he wrapped up the heroin," the Court could only have meant about the time of the crimes in 1951 charged herein, and not related to appellant's past conviction in 1946.

With respect to the Government's contention that appellant's convictions in 1942 and 1946 would show a criminal intent, that cannot be even considered worthy but is utterly ridiculous. How can a conviction in 1946 show that the individual had a criminal intent five years later to commit a crime. Where is the line to be drawn? Is this Court prepared to say that a man convicted in 1946 and charged with having committed a crime in 1951, that that lapse of five years would show a criminal intent, but if it were six years, it would show no criminal intent? No evidence was introduced or offered by the Government about appellant during that five year period.

In *Caldwell* v. *United States*, 78 F. 2d 282, at the time of the trial the defendant was twenty-six years of age and one of the Government's witnesses was permitted over the objection of the defendant's counsel to testify that an investigation disclosed that the defendant had been sentenced in a Federal Court, about the year 1925, for violation of the National Prohibition Act. This prior conviction of the defendant happened ten years before the trial. The Court in that case held that while it is well settled that evidence of similar transactions may be admissible, under certain circumstances, as bearing upon the question of intent, purpose, design, or knowledge, the transaction, the testimony as to which was here permitted to be presented to the jury, was entirely too remote and the evidence was not admissible. (p. 283).

In offering the previous convictions of appellant, without appellant taking the witness stand and not offering any evidence of good character but resting on the Government's case, the Government relied also on the case of

Enriquez v. *United States*, 188 F. 2d 313. In that case the defendant and five others were charged with the sale of narcotics and conspiracy. In that case, the Court said:

> "The effort to capitalize on the alleged error in admitting this record is beset with serious procedural difficulties. At a later stage of the trial appellant took the witness stand and testified generally and at length in his own defense. This being so, his prior conviction might have been proved in due course either by cross examination or by production of the record, so that the fact and nature of the conviction would presumably have been gotten before the jury in any event" (p. 316).

In this case, appellant rested on the Government's case, without testifying or introducing any evidence of good character. Therefore the case of *Enriquez* v. *United States, supra*, relied on by the Government at the trial does not apply.

CONCLUSION

The judgment of conviction of appellant should be reversed and the indictment dismissed.

Respectfully submitted,

HENRY A. LOWENBERG
Attorney for Appellant

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 172—October Term, 1956.

(Argued December 10, 1956 Decided February 4, 1957.)

Docket No. 24342

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH GEORGE SHERMAN,

Appellant.

Before:

SWAN, MEDINA and WATERMAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge*.

Defendant appeals from a judgment of conviction of selling narcotics in violation of 21 U. S. C. Section 174. Affirmed.

Appendix

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (Malcolm Monroe and Maurice N. Nessen, Assistant United States Attorneys, New York City, of Counsel), *for appellee.*

HENRY A. LOWENBERG, New York City, *for appellant.*

MEDINA, *Circuit Judge*:

This appeal is from a judgment of conviction under an indictment charging sales of narcotics on three occasions in violation of 21 U. S. C. Section 174. The evidence established the following facts: appellant and one Kalchinian, both addicted to the use of narcotics, became acquainted as a result of meeting several times in the office of the physician whom they were consulting in an effort to cure their addiction and in the pharmacy to which they took their prescriptions to be filled. After several casual greetings, they began to discuss their experiences in the use of narcotics. In response to a question, appellant told Kalchinian that he was then purchasing drugs. Kalchinian, who was not responding well to treatment, informed appellant of this fact and requested an introduction to appellant's supplier. After two or three such requests, appellant stated that the man was going out of business and for this reason he could not introduce appellant to him. Upon Kalchinian's asking, "How can I then?" appellant said he might be able to get some drugs for him. To a subsequent inquiry appel-

lant replied that he was working on it. Kalchinian asked how he could get in touch with appellant, but appellant suggested instead the following procedure. If and when he had drugs for Kalchinian he would telephone him and tell him what time to meet him. Appellant took Kalchinian's telephone number and designated a certain street corner as the meeting place. He said that he expected to purchase heroin at $25 for 1/16 ounce and that he would let Kalchinian have half that amount for $15, explaining that the additional $2.50 was for his cab fare and trouble. Kalchinian agreed to these arrangements, and several transfers took place. Later Kalchinian, who was awaiting sentence on a narcotic charge to which he had pleaded guilty and who had previously worked with the Federal Bureau of Narcotics on two cases, for the first time informed the Bureau of his dealings with appellant.

On the three dates charged in the indictment, agents observed Kalchinian exchange $15 for a small quantity of heroin contained in a glassine envelope concealed in an empty cigarette package. The government also proved, over appellant's objection, that he had twice before been convicted on narcotic charges: in 1942 for selling opium and in 1946 of possession of 720 grains of morphine in 5-grain capsules, 261 grains of heroin in six cellophane bags, and two ounces of opium in three jars.

The principal issues on this appeal revolve about the defense of entrapment. The Supreme Court has held "the controlling question" under this defense to be "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own

officials." *Sorrells* v. *United States*, 287 U. S. 435, 451. Thus, if it be shown without more that the defendant was induced by government agents to engage in the proscribed activity, no conviction may be had. *United States* v. *Masciale*, 2 Cir., 236 F. 2d 601; *United States* v. *Sherman*, 2 Cir., 200 F. 2d 880. But "the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises." *Sorrells* v. *United States, supra.* "There is no entrapment when a purchase is made at the instance of the law officers where the seller is ready and willing, without persuasion and awaiting any propitious opportunity, to commit the offense." *United States* v. *White*, 2 Cir., 223 F. 2d 674.

On a prior appeal in the case at bar, *United States* v. *Sherman, supra*, Judge Learned Hand stated, page 882:

> "As we understand the doctrine it comes to this: that it is a valid reply to the defence, if the prosecution can satisfy the jury that the accused was ready and willing to commit the offence charged, whenever the opportunity offered. In that event the inducement which brought about the actual offence was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person, but has only provided the means for the accused to realize his pre-existing purpose. The proof of this may be by evidence of his past offences, of his preparation, even of his 'ready complaisance.' Obviously, it is not necessary that the past offences proved shall be precisely the same as that charged, provided they

are near enough in kind to support an inference that his purpose included offences of the sort charged."

On that appeal we set aside appellant's conviction because of error in the charge. This error was corrected on the second trial and the evidence was sufficient to warrant a finding "that the accused was ready and willing to commit the offence charged, whenever the opportunity offered." The jury was justified in regarding appellant's hesitancy as no more than prudent caution on the part of an experienced trafficker in narcotics. Certainly his *modus operandi* suggested such experience. Nor was the jury bound to accept appellant's statement that the sales were without profit. Kalchinian testified that he had obtained the same quantities from his prior supplier at lower rates. Appellant's prior convictions were of course cogent evidence of a predisposition to commit the offenses charged. Appellant's last conviction was in 1946, five years before the offenses charged, but he does not appear to have strayed far from the trade. He was obtaining drugs illegally during the intervening period and it was a permissible inference that he had not changed his ways. In this connection it may be noted that this second conviction was separated from the first by a gap of four years and that the fact that he continued to traffic in narcotics following his first conviction indicated a disposition to continue his trade despite detection and punishment.

Appellant contends that evidence of these prior convictions was improperly admitted since "It is elementary that the convictions of a defendant may be received in evidence only if the defendant testifies in his own behalf or intro-

duces evidence of good character." But, there are exceptions to this rule, 2 Wigmore, Evidence §§300-373, and one of them is that such evidence is admissible to negative the defense of entrapment. The Supreme Court stated in *Sorrells* v. *United States, supra,* "The predisposition and criminal design of the defendant are relevant. * * * if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

Justice Roberts dissented in *Sorrells* and Justices Brandeis and Stone joined in his dissent. The theory of the dissenters was that it was the function of the court alone to determine the question of whether the court was being made "the instrument of wrong," due to fraudulent or improper conduct of law enforcement officers, and that the submission of the issue of entrapment with the other issues for a general verdict was in effect construing a penal statute "as containing an implicit condition that it shall not apply in the case of entrapment." This reasoning was supported by a further argument closely touching the case now before us. Justice Roberts commented on the fact that it was common practice in criminal trial in which the defense claimed entrapment to permit the government in rebuttal to show "that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense," and he continued (at p. 458): "This procedure is approved by the opinion

of the court. The proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted." All this was said to support the view of the dissenters that the crime as defined in the statute made no reference to entrapment, that such a question merely affected the purity of the judicial process which was matter for the court alone. But the argument was rejected, and it is thus clear, as thus stated by Justice Roberts, that it was the considered position of the majority of the Court that a defendant's prior convictions were admissible to negative the defense. We have explicitly adopted this rule. *United States* v. *Sherman, supra; United States* v. *Johnson,* 2 Cir., 208 F. 2d 404, cert. denied 347 U. S. 928. See also *Carlton* v. *United States,* 9 Cir., 198 F. 2d 795.

It has been argued that these decisions are not applicable here, since they deal only with the introduction of such evidence in rebuttal, whereas in the case at bar the evidence of prior convictions was admitted as part of the government's case in chief. But to understand these decisions as making the admissibility of such evidence always depend upon whether the defendant had introduced evidence would emasculate the rule and work grave prejudice to the government in cases where defendant, as here, elected to go to the jury on the proofs adduced by the prosecution in its case in chief. Accordingly, we reject appellant's contention that no evidence of a predisposition to commit the crime and no proof of prior convictions may ever be introduced by the government except in rebuttal to affirmative evidence of entrapment adduced by defendant. But we are not called upon to, nor do we, propound any broad general rule

on the subject. We do not now hold that evidence of predisposition or prior convictions may be introduced by the prosecution whenever there is a possibility that entrapment will be invoked as a defense.

"This is one of those classes of cases where it is safer to prick out the contour of the rule empirically, by successive instances, than to attempt definitive generalizations." *In re All Star Feature Corp.*, 231 Fed. 251 (L. Hand, *J.*).

We now need go no further than to hold that proof of prior convictions is admissible as part of the prosecution's case in chief where it is clear, as in the case before us, that the defense will be invoked.

There can be no doubt that such was appellant's intention in the case at bar. On the first trial, he introduced no evidence but requested a charge on entrapment, relying on the testimony of Kalchinian. When his attorney was informed by the prosecutor that Kalchinian would not testify on the second trial, he demanded that the government call him again, evidently so that he could again rely on the defense. He informed the court that he would do so, and devoted his entire opening statement to a denunciation of Kalchinian, telling the court and jury that appellant had been entrapped. His cross-examination was of the same pattern, bringing out the facts relevant to entrapment.

Under these circumstances it was proper for the government to introduce evidence of the prior convictions.

Appellant further contends that, because of the passage of time between the prior convictions and the offenses charged, the evidence should have been excluded as unduly prejudicial. We disagree. While it is doubtless true that the more remote the prior convictions the less their proba-

tive force, we are not prepared to say that on this record the probative force of these prior convictions was outweighed by the possibility that they might prejudice the jury. Cf. *Enriques* v. *United States*, 9 Cir., 188 F. 2d 313.

Appellant's only other contention is that the transfers proven were not "sales" within the meaning of the statute, since the evidence showed that appellant was sharing the narcotics without profit. This contention must fail, for: (1) the jury may have believed that appellant was making the transfers and disbelieved his reported statement that he was doing so without profit; and (2) the statute enjoins all sales, not merely sales for profit.

Affirmed.